International Journal of Engineering & Technology, 7 (3.30) (2018) 280-283

International Journal of Engineering & Technology

Website: www.sciencepubco.com/index.php/IJET

Research paper

Coordination of Fragmentation within the International Air Law

Olexandr Radzivill[1], Yuriy Pyvovar[1], Iryna Sopilko[1], Iryna Pyvovar[2]

[1]Constitutional and Administrative Law Department, National Aviation University, Kyiv 03058, Ukraine
[2]Institute of Criminal-Executive Service of Ukraine, Kyiv 01121, Ukraine
**Corresponding author E-mail: PyvovarYI@nau.edu.ua*

Abstract

The purpose of the study is to analyze the development and branching of the directions for codification and institutionalization of international air law in the context of discussions involving fragmentation of international law. The main task of the work was to determine, on the example of international air law, the nature of the formation and codification of unified international standards in this area and their subsequent distribution of the areas of regulation and levels of specification by specialized subjects of delegated rule-making. There have been used methods of comparativistics and hermeneutics on which, first of all, the comparison and interpretation of the texts of the Paris and Chicago Conventions and their annexes have been made. It is shown that international public law has a tendency of movement from national acts through the level of bilateral agreements to the formation of agreements and regulations of the regional and global levels. This tendency is also quite clearly expressed in the history of the development of international air law. It is also determined, as a fundamental historical trend, the preservation of the dynamic inverse association between the indicated levels in the complication and branching of the directions of codification and institutionalization of international air law. This indicates the need to take into account a nonlinear nature of developmental processes of any legal field, including in its characteristics complications, with the support of constant feedback between different levels of legal personality; connection of the subject area of regulation with the specific volume of competence of institutions responsible for one or another level of delegated rule-making, etc. Considering these and other aspects is important to harmonize the problems of fragmentation and to ensure the effectiveness of international law in general and international air law in particular. The connection of the fragmentation of international law is largely due to the uncertainty of the status of individual levels of delegated legal personality and inconsistency of their correlation at the level of international agreements. The problems of fragmentation, which are certainly inadmissible from the point of view of positivist legal thinking, are a source of uncertainty in many important issues that require clear coherence, regardless of conceptual approaches. From the standpoint of postpositivist concepts, it should be sought not so much in substantive codified rules, but in the effectiveness of procedural norms and the activities of the institutions responsible for reconciling the conflict of interests. However, substantive rules must be also involved in new pluralistic approaches to the law, which is not identified with the will of the state.

Keywords: *International Public Law, Flight Rules, Multilevelness of the Legal System, International Air Law, Harmonization of Law*

1. Introduction

The demands of international cooperation require the states to coordinate their legislation in various sectoral focus areas through the development and standardization of international standards. The codification of international law which is currently carried out at different levels of the delegated legal personality plays a decisive role in this process. Sectoral codified rules of international law adopted on the basis of technical, economic, social and other requirements, authorize their unified application by states and founders of international law, ensuring the coordination and predictability of international cooperation. The systematization of practices, unification of existing standards and development of new standards, monitoring of their implementation, and many other functions are carried out by specialized international organizations of the global and regional levels. Each of them, unlike the legal equality of sovereign states, has a unique legal personality due to its functional purpose and the will of the founding states. This raises the question of the adequacy and even expediency of defining a system of common unified rules for regulating the activities of international organizations (this may be indicated by protracted process of the entry into legal force of the Vienna Convention on the Law of Treaties between the States and International Organizations from 21/03/1986). Regionalism is also becoming an important phenomenon of international law, in which a new level of legal personality is institutionalized, the rules of which compete with both national and international law of a global level. The complex of issues related to the determination of legal force of the norms of international law of different origin and purpose, the delimitation of the competence of subjects of delegated lawmaking, the definition of criteria for recognizing the international legal personality of individuals of private law, etc. is the subject of discussion on the fragmentation of international law. Fragmentation of norms is considered as one of the essential aspects of the development of modern international law, which consists in forming "within the framework of a single international legal system of semi-dependent legal systems, increasing the probability of a conflict in law enforcement" (Plotnikov, 2013). The history of development and the current dynamics of the international air law sys-

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tem well illustrates the problematic issues of fragmentation and the direction of their solution.

2. Research Results

In recent decades, the issue of fragmentation has been the question under discussion in a series of reports from the research group headed by Martti Koskenniemi, the Commission on International Law and copyright research. An important positive experience with delimitation of competences was acquired in the processes of European integration (Herdegen, 2008). Fragmentation is also associated with the changes in international law to the legal personality of private law, subjection to the state: international agreements of the regional and global level give the opportunity to use international legal institutions to protect their rights and legitimate interests, and in such a way to become carriers of certain international rights and responsibilities, acquiring a special (fragmentary) international legal personality (Pysmenna, 2013). This includes not only international human rights treaties: such options are envisaged, in particular, in the Marrakesh Agreements, the Washington Convention on the Settlement of Investment Disputes, Agreements on the Unification of Certain Rules for International Carriage by Air (Warsaw and Montreal) and a number of other agreements.

In one of the reports of the International Law Commission on modern processes of fragmentation of codification processes, the development of international law is defined as a movement from bilateral arrangements, through regional arrangements, to the erga omnes obligations (Fragmentation of international law, 2005). The history of codification and institutionalization of the international air law in general also follows this tendency. Unlike maritime law, in which customary norms had dominated for centuries, the codification of air law was accompanied by the development of air navigation almost from the very beginning of aviation formation. The first laws of European nations were adopted in 1909-1912 in France, Germany, Great Britain, Austria, Russia and the United States. In the same period, the International Aviation Law Committee developed the International Air Code (1911), which was of a recommendatory nature (Bordunov, 2006). The first bilateral agreement on aerial navigation was concluded between France and Germany of June 23, 1913 (Bordunov, 2006). After World War I, the efforts to create a new international legal order involved international air law. The Paris Convention Relating to the Regulation of Aerial Navigation of 13 October 1919 was adopted at the Paris Peace Conference of 1919-1920 (Convention on Regulation of Air Traffic, 1919). Pursuant to Article 34 of the Convention, there was founded the International Commission for Air Navigation which obeyed the League of Nations and had to clarify and harmonize numerous organizational and technical provisions of the Convention and annexes to it. A little later, in the western hemisphere, the Permanent American Aeronautical Commission headquartered in Lima (1927) was set up to perform similar functions on the American continent (Neradko, 2014). Special provisions with more detailed regulation of certain aspects of air navigation were set out in eight annexes (A-N) to the Convention. The transfer of special issues into the annexes, as a common method of codification process in future, has become a well-established authoritative basis for further development of international air law. The Paris Convention of 1919 covered all the issues relevant to the air navigation, which had not yet been differentiated into separate regulatory areas that emerged subsequently. Together with the annexes, the Convention laid the foundations for multi-level air traffic control involving international institutions and participating states in the rule-making process. The Convention provides for the right of the contracting states to conclude bilateral agreements with non-contracting states (Article 5).

Quite soon, the needs for commercial operation of aircraft prompted the states to establish a separate system of international legal regulation in this area. On October 4-12, 1929, in Warsaw on the second international conference relating to private air law, the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 was signed. The Convention specified standard requirements to the carriage documents (passage ticket, baggage check and airfreight bill) and unified registration procedures (Convention on the Unification of Certain Rules for International Carriage by Air).

Three main directions of codification of modern international air law and the institutionalization of international cooperation in the field of civil aviation operations can be characterized as: 1) regulation of interstate relations regarding international air traffic; 2) regulation of commercial air transportation; 3) ensuring flight safety. The legal basis of this system is laid down by the Chicago Convention on International Civil Aviation of December 7, 1944 (hereinafter the Convention) (Convention, 1944). The Convention laid the foundations for a common strategy of states parties for the development of air transport in peacetime. As O. Neradko notes, the fact of the duration of ideological and substantive relevance of the Convention is impressive to this day (Neradko, 2014).

Having regularized the basic principles of intergovernmental cooperation on provision and regulation of air traffic, the Convention serves as a unifying regulatory framework on the basis of which the complex of normative acts of various levels of specialization and rulemaking is dynamically developed, modified and diversified. The Convention consists of the preamble and four parts. An integral part of the Convention is its annexes (example, Annex 2, Annex 8, Annex 11, Annex 15, Annex 17, Annex 18, Annex 19) accounting for 19 as of today.

The main specialized intergovernmental body of the United Nations in the field of regulating civil aviation activity is the International Civil Aviation Organization, the statute of which forms Part II of the Convention. The Statute now operates in the ninth edition, where the changes from 1948 to 2006 have been consolidated (ICAO European, 2016). ICAO members now include 192 states. With a significant inequality in the economic capabilities of member states, the Organization seeks to ensure their cooperation on the basis of mutual benefit: the states representing the interests of aircraft operators are interested in the operational unification within the ICAO rules, procedures, normative standards and standard agreements governing international air services under; the interests of aircraft manufacturers make the states to ensure compliance of the conditions of their activities and technical characteristics of aircraft to the standards of ICAO; developing countries use ICAO membership for the development of national civil aviation, the development of national air traffic infrastructure, guided by standards and recommendations (Global Aviation Safety Plan Highlights, 2013). ICAO acts through its statutory bodies (Assembly, Council, Air Navigation Commission), a secretariat headed by the Secretary General and standing committees. The development of new standards and upgrading of existing standards by the ICAO divisions is a continuous process. Such an organization helps to modernize the air law system without radical changes, without destroying its overall structure, the basis of which forms the rules of the Chicago Convention, acting on the basis of generalization of flight practice and special research, systematization, unification and standardization of norms and rules, their codification in international acts and execution control.

Not all provisions of the Convention have the same importance and certainty, which requires different levels of specification of its provisions for implementation in the legislation of the member states and the implementation of these norms by the distributors. In particular, V. Bordunov claims that the issues of the Convention, which require obvious concretisation at the level of bilateral agreements, are the following: Prohibited Areas (Article 9); Landing at Customs Airport (Article 10); Applicability of Air Regulations (Article 11); Rules of the Air (Article 12); Entry and Clearance Regulations (Article 13); Prevention of Spread of Disease (Article 14); Airport and Similar Charges (Article 15); Search of Aircraft (Article 16) (Bordunov, 2006). A special place among international aviation regulations belongs to the flight rules speci-

fied in Annex 2 (Rules of the Air, 1946), which, according to Article 12 of the Chicago Convention, must be respected by the member states with the greatest possible integrity.

In addition to the annexes and their periodic updates (new editions), ICAO develops different manuals on specific issues of aviation activities, including: Safety Management Manual; Accident Preventing Manual; Manual of Aircraft Accident Investigation; Manual of Aircraft Accident and Incident Investigation; Manual concerning Safety Measures relating to Military Activities Potentially Hazardous to Civil Aircraft Operations; Manual of Radiotelephony; Manual concerning Interception of Civil Aircraft; Manual on the Regulation of International Air Transport (Global Aviation Safety Plan Highlights, 2013; Definition of Civil/State Aircraft and its Importance for Aviation, 2015; Card Index of International Standards, 2018).

From the last decade of the twentieth century there have been important changes in the international regulation of international commercial air transportation. The results of the Uruguay Round and the adoption of "Marrakesh Package" on April 15, 1994 also affected the aviation sphere (Annex on Air Transport Services to the General Agreement on Trade in Services from, 1994; Civil Aircraft Sales Agreement, 1979). In the same year, the 4th World Air Transport Conference was held in Montreal, on which the main current aspects of regulation of the economic activity of air transport were considered. The conference recognized the need for significant changes in the regulation of air transport in order to adapt air services to the conditions of liberalization. Important changes have also taken place in the regulation of international commercial air transport with the adoption of the Montreal Convention on the Unification of Certain Rules for International Carriage by Air on May 28, 1999. It united in a single international treaty and modernized a complex of international acts that has developed over 70 years of the Warsaw Air Traffic Management System. In March 2003, ICAO hosted the World Air Transport Conference entitled "The Challenges and Opportunities for Liberalization", which was attended by 145 states and 29 international organizations. The main issues under discussion were the following: conditions and experience of liberalization; aspects of liberalization regarding flight safety and aviation security; forms of communication with the air carrier and the ability to control its activities; liberalization of access to the market of air services; rent of aircrafts; air cargo; guarantees of fair competition; interests of consumers of air services; settlement of disputes; transparency; changes in the standard air service agreement (Challenges and Opportunities for Liberalization, 2003). The conference also emphasized that the application of the modern uniform regime of air carrier liability established by the Montreal Convention of 1999 would play an important role in this process (Challenges and Opportunities for Liberalization, 2003). The Conference adopted "Declaration of Global Principles of International Air Transport Liberalization" which consolidated the basic principles for harmonization of the needs of liberalization while maintaining the appropriate level of competence of states in the area of compliance with international obligations in the field of air navigation (Declaration, 2003). This act is an important step in expanding the competence of private law entities, which are the main actors in international cooperation on the operation of civil aviation.

3. Conclusions

The connection of the fragmentation of international law with the uncertainty of the status of individual levels of delegated legal personality and their relationship once again draws the attention of researchers to "The Law of Nations", which remains an inexhaustible array of philosophical and legal ideas and experience in harmonizing different levels of legal personality on the basis of criteria of natural law, as observed by J. Scelle (Scelle, 1932). According to Leathley, international public law, which became an integral system only with the adoption of the Charter of the United Nations, arose in the European legal tradition of the new time, separated from "The Law of Nations" (Leathley, 2007). In the context of the current rapid branching of international public law and the areas of legalization of its feedback with the subjects of private law, the principles of the law of nations become actual again. "The New Law of Nations" may include institutionalization and normative maintenance on the postpositivist conceptual basis of all the established levels of collective legal personality with the definition of volumes of the inalienable rights and obligations of the subjects of each level, as well as the development of principles and procedures for harmonization of different levels of legal personality and procedural rules for harmonization of current conflicts of interest that will naturally arise in the process of intersubjective cooperation (Radzivill, 2017).

In the regulation of international air services, where bilateral intergovernmental agreements are still the basic level of regulation, their regulatory framework is provided by a dynamic, multilevel array of multilateral international agreements of universal and regional levels, legal acts of the regional institutions and other unified rules and standards developed under the auspices of ICAO and specified on regional and bilateral level. International air law gives a good example of dynamic development and branching of the directions and levels of regulation without losing the systemic integrity and overall efficiency of this international legal field. The development of new standards and upgrading of existing standards by the ICAO divisions is a continuous process. The organization of systematization and standardization of norms and rules on the basis of generalization of flight practice and special studies ensures their codification and controls their implementation through subordinate institutions by continuous monitoring of the effectiveness of existing mechanisms and the needs for new developments. It makes it possible to modernize the air law system without radical changes, without destroying its overall structure, the basis of which forms the rules of the Chicago Convention. The legal, administrative, economic, operational and other issues and procedures codified in the Convention are specified in the three thousand bilateral air transport agreements; it establishes the role of states in ensuring international law and order in the field of air navigation.

Acknowledgments

This work was supported in part by Department of Constitutional and Administrative Law research work is state budget theme «Public and legal mechanism of guaranteeing Ukraine's national interests» No. 55/13.01.02.

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